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11

12 UNITED STATES DISTRICT COURT  
13  
14 SOUTHERN DISTRICT OF CALIFORNIA  
15

16 UNITED STATES OF AMERICA, ) CASE NO. 08CR2428 JAH  
17 )  
18 Plaintiff, )  
19 )  
20 v. ) NOTICE OF MOTION AND MOTION  
21 ) (1) FOR DISCOVERY; (2) FOR  
22 SEARCH AND DISCLOSURE OF  
23 VICENTE MANUEL AGUIRRE, ) ELECTRONIC SURVEILLANCE;  
24 ) (3) TO REVEAL INFORMATION  
25 Defendant. ) REGARDING GOVERNMENT  
26 ) WITNESSES AND INFORMANTS;  
27 ) FOR LEAVE TO FILE  
28 ) ADDITIONAL MOTIONS  
DATE: August 25, 2008  
TIME: 8:30 a.m.

TO: KAREN P. HEWITT, UNITED STATES ATTORNEY, AND CAROLINE P.  
HAN, HER AUTHORIZED REPRESENTATIVE:

PLEASE TAKE NOTICE that on August 25, at 8:30 a.m., or  
as soon thereafter as counsel may be heard, Defendant VICENTE  
MANUEL AGUIRRE, by and through his counsel, Philip A. DeMassa,  
of Philip A. DeMassa APC, will move the Court to enter an Order  
requiring the Government to comply with the attached requests  
for discovery and disclosure, and, in the case of tangible  
items, to produce for inspection and copying by the Defendant,  
all evidence and information in the possession, custody or  
control of Government, which may be favorable to the Defendant

1 or material to the issue of guilt or innocence, or which could  
2 lead to such material or favorable evidence.

3 **MOTION**

4 Defendant VICENTE MANUEL AGUIRRE, by and through his  
5 counsel of record, and pursuant to provisions of Rules 12, 14,  
6 16, 24 and 41 of the Federal Rules of Criminal Procedure and the  
7 4th, 5th, 6th and 14th amendments of the United States  
8 Constitution, hereby moves this Honorable Court to order  
9 discovery of the below enumerated items:

10 **(A)**

11 **REQUESTED ITEMS OF GENERAL DISCOVERY**

12 1. All pre-indictment and post-indictment statements of  
13 the Defendant, whether recorded or unrecorded, oral or written,  
14 signed or unsigned, made to Government agents, which are  
15 relevant to the crimes charged, either with or without his  
16 knowledge that such persons were Government agents at the time  
17 he made said statements;

18 2. All pre-indictment and post-indictment statements of  
19 the Defendant whether recorded or unrecorded, oral or written,  
20 signed or unsigned made to persons other than Government agents,  
21 which are relevant to the crimes charged, and whom the  
22 Government intends to call as witnesses in this case;

23 3. All pre-indictment and post-indictment statements of  
24 the Defendant whether recorded or unrecorded, oral or written,  
25 signed or unsigned made to persons other than Government agents,  
26 which are relevant to the crimes charged and either exculpatory  
27 or inculpatory, whom the Government does not intend to call as  
28

1 witnesses in this case;

2           4. All documents and other tangible objects which are  
3 material to the preparation of the defense, or are intended for  
4 "use" by the Government at the trial of this case in its case-  
5 in-chief or in rebuttal, or which were obtained from or belong  
6 to the Defendant;

7           5. The reports of any scientific tests, examinations,  
8 or experiments, or physical or mental examinations, or copies  
9 thereof, including, but not limited to: (1) a statement of all  
10 material or other information or sources considered by the  
11 examiner in arriving at an opinion, the methodology used, and  
12 the findings and conclusions of the examiner, (2) a resume and  
13 curriculum vitae of the examiner's qualifications, experience,  
14 subject matter of the examiner's testimony, and prior occasions  
15 of testimony as an expert, and (3) any worksheets, photographs,  
16 notes, or other things used to assist the examiner in reaching  
17 an opinion and recording the process or methodology of reaching  
18 an opinion;

19           6. The names of all persons the Government intends to  
20 call as witnesses at the trial in its case-in-chief;

21           7. The names of all persons who have given relevant  
22 information to the Government about this instant case whom the  
23 Government does not intend to call as witnesses at the trial;

24           8. The statements of all persons the Government  
25 expects to call as witnesses at the trial of this case;

26           9. The statements of all persons having relevant  
27 information about this case, whether inculpatory or exculpatory,  
28

1 whom the Government does not intend to call at the time of  
2 trial;

3 10. All pre-indictment and post-indictment statements  
4 of alleged or non-charged co-conspirators whether or not  
5 indicted, either recorded or unrecorded, oral or written, signed  
6 or unsigned, made to Government agents, which are relevant to  
7 the crimes charged, either with or without their knowledge that  
8 such persons were Government agents at the time they made such  
9 statements;

10 11. All pre-indictment and post-indictment statements  
11 of alleged or non-charged co-conspirators whether or not  
12 indicted, either recorded or unrecorded, oral or written, signed  
13 or unsigned made to persons other than Government agents, which  
14 are relevant to the crimes charged, and whom the Government  
15 intends to call as witnesses in this case;

16 12. All pre-indictment and post-indictment statements  
17 of alleged or non-charged co-conspirators whether or not  
18 indicted, either recorded or unrecorded, oral or written, signed  
19 or unsigned made to persons other than Government agents, which  
20 are relevant to the crimes charged and either exculpatory or  
21 inculpatory, whom the Government does not intend to call as  
22 witnesses in this case;

23 13. The conviction records of all witnesses the  
24 Government intends to call in its case-in chief or rebuttal;

25 14. The full and complete extent of any dealing with,  
26 or promises or inducements to, prospective Government witnesses  
27 in this case made by Government attorneys, agents, and  
28

1 employees;

2           15. Notice of the Government's intention to use any  
3 evidence (in its case-in-chief at trial) which Defendant may be  
4 entitled to suppress under Rule 4(a), 12 or 41 of the Federal  
5 Rules of Criminal Procedure, the Fourth, Fifth, or Sixth  
6 Amendments to the United States Constitution, and 18 U.S.C.  
7 Sections 2510, 2515, 2518, and 3504;

8           16. The Grand Jury testimony of all participating  
9 witnesses in, and percipient witnesses to, the crimes herein  
10 charged against the Defendant;

11           17. The copies of any and all search warrants  
12 (including Affidavits in Support Thereof and Inventories listing  
13 articles seized when executing said warrant) that resulted in  
14 the seizure of evidence or the fruits thereof, which the  
15 Government intends to introduce into evidence in its case-in  
16 chief or in rebuttal.

17           18. All information in whatever form, source or nature,  
18 which is favorable to the defense and material to the issues of  
19 either guilt or punishment, either through an indication of the  
20 Defendant's innocence, negation of any elements of the charged  
21 offenses, or through the potential impeachment of Government  
22 witnesses or contradiction of Government evidence; and all  
23 information which may be or become of benefit to the Defendant  
24 in preparing for, or presenting the merits of the defense at  
25 trial.

26           19. All documents and other tangible objects that tend  
27 to show acts or crimes not named in the Indictment which the  
28

1 Government may use to prove Defendant's motive, opportunity,  
2 preparation, plan, knowledge, identity, or absence of mistake or  
3 accident.

4 20. The names and addresses of all witnesses the  
5 Government intends to or may utilize to show acts or crimes not  
6 named in the Indictment to prove Defendant's motive,  
7 opportunity, preparation, plan, knowledge, identity, or absence  
8 of mistake or accident.

9 21. Disclosure by the Government of its intent to  
10 utilize evidence of acts or crimes not named in the Indictment  
11 to prove Defendant's motive, opportunity, preparation, plan,  
12 knowledge, identity, or absence of mistake or accident.

13 22. The names and addresses of all subscribers to  
14 telephones at all residences, cell phones or push-to-talk  
15 devices searched, intercepted or seized, and all telephone tolls  
16 seized.

17 23. The names and addresses of all subscribers to  
18 pagers, portable telephones, and all tolls or records of their  
19 use and billing history.

20 24. Proof of title or leaseholds on all the premises  
21 and vehicles searched.

22 (B)

23 **MOTION FOR SEARCH AND DISCLOSURE**  
24 **OF ELECTRONIC SURVEILLANCE**

25 Defendant hereby moves this Court to order the  
26 Government to disclose the following:

27 1. Any and all voice records, tapes, mechanical or  
28 electrical recordings, logs, records, memoranda, letters, and

1 articles of any electronic or other surveillance of any wire or  
2 oral communications:

3 (a) To which any Defendant named in this  
4 indictment was identified as a party;

5 (b) At any place in which any Defendant had an  
6 "interest" at the time of surveillance, "interest"  
7 meaning any property right or any other nexus of use and  
8 reasonable expectation of privacy;

9 (c) Intercepted for the purpose, in whole or in  
10 part, of gathering evidence or leads against any  
11 Defendant, i.e., directed against any Defendant;

12 (d) In which any Defendant is named or otherwise  
13 referred to;

14 (e) Intercepted pursuant to warrant or application  
15 in which any Defendants' name appears, or which warrant  
16 or application was based upon investigatory memoranda,  
17 etc., in which any Defendants' name appears;

18 (f) Any place in which any Defendant was at the  
19 time of surveillance; and

20 (g) Described in (b) through (f) wherein a party  
21 to same is unidentified.

22 2. Any and all actual voice records, tapes, mechanical  
23 or electronic recordings, logs, records, memoranda, letters, and  
24 articles of any electronic or other surveillance of any wire or  
25 oral communications described in 1(a)-(g), supra, as to any  
26 unindicted co-conspirators, or other relevant persons.

27 3. Any and all actual voice records, tapes, memoranda,  
28

1 letters, and articles of any electronic or other surveillance of  
2 any wire or oral communications to which any attorney for a  
3 Defendant, his or her agents or employees was a party, and any  
4 conversation at which said attorney, his or her agents or  
5 employees, are present. This includes any attorney and his/her  
6 agents and employees who have participated in conversations  
7 which have been intercepted in any way since they became a  
8 member of the joint defense.

9           4. Any and all actual voice records, tapes, mechanical  
10 or electrical recordings, logs, records, memoranda, letters, and  
11 articles of any electronic or other surveillance of any wire or  
12 oral communications to which a party to that conversation  
13 allegedly "consented."

14           5. Any and all actual voice records, tapes, mechanical  
15 or electrical recordings, logs, records, memoranda, letters, and  
16 articles of any electronic or other surveillance of any wire or  
17 oral communications which are arguably exculpatory under Brady  
18 v. Maryland, 373 U.S. 83 (1983).

19           6. Any and all actual voice records, tapes, mechanical  
20 or electrical recordings, logs, records, memoranda, letters, and  
21 articles of any electronic or other surveillance of any wire or  
22 oral communications such as are described in 1 through 5, supra,  
23 which surveillance revealed the existence of said conversations  
24 but not the contents. If the Government claims any intercepted  
25 conversations with attorneys, agents and/or employees are not  
26 discoverable, the Defendant requests an in camera review.

27           7. For any electronic or other surveillance as  
28



1 described in 1 through 6, supra, for which there are no voice  
2 records, tapes, mechanical or electrical records, logs,  
3 memoranda, records, letters, or articles, the names and business  
4 addresses of the persons who conducted said surveillance or who  
5 have knowledge of said surveillance.

6 8. The demands for disclosure 1 through 7, supra,  
7 embrace electronic or other surveillance undertaken not only by  
8 the United States, its agents and employees, but by any  
9 governmental agency--state or local--and by private persons or  
10 corporations, and any foreign jurisdictions.

11 9. For any electronic or other surveillance requested  
12 in 1 through 8, supra, for which this Court might deny the  
13 demand for voice records, tapes, mechanical or electrical  
14 recordings, logs, memoranda, records, letters, or articles of  
15 same, the existence and circumstance of same; "circumstances" is  
16 meant to include date and place of the surveillance, who was  
17 present at said place, who conducted said surveillance and  
18 duration of the surveillance, the manner in which it was  
19 conducted, and all other relevant facts.

20 10. Any and all applications, affidavits, memoranda,  
21 and other papers submitted in support of applications for  
22 executive, administrative, or judicial approval in domestic or  
23 foreign jurisdictions for such surveillance as described, supra,  
24 and all administrative, judicial, and executive orders,  
25 opinions, and decisions responsive thereto or relating to the  
26 surveillance described, supra.

27 11. Notice that the Government intends to use any or  
28

1 all of the actual voice records, tapes, mechanical or electrical  
2 recordings, logs, records, memoranda, letters, and articles of  
3 any electronic or other surveillance requested, supra, or any  
4 evidence derived therefrom as evidence-in-chief at trial.

5 12. Defendant seeks copies of all progress reports of  
6 such surveillance.

7 13. Any and all letters of instructions and other  
8 directive material issued by the prosecution to the wiretap  
9 monitoring agents instructing the agents as to the methods and  
10 manners of operation to be followed in conducting the electronic  
11 surveillance.

12 14. The requests made, supra, seek not only disclosure  
13 of surveillance presently known to the Government but that  
14 which, in the exercise of due diligence, may become known to it  
15 or its agents or others working with it.

16 15. Defendant further requests an Order of continuing  
17 disclosure of the items sought, supra, under Federal Rule of  
18 Criminal Procedure 16 and any applicable local rule or rules.

19 16. Defendant requests that this Court enter an Order  
20 directing the Government to conduct a search before trial of the  
21 files of every federal agency conducting electronic surveillance  
22 investigating Defendant and all agencies cooperating with same  
23 surveilling and investigating agencies in order to determine  
24 whether there has been electronic surveillance as described,  
25 supra.

26 17. Defendant requests entry of an Order requiring the  
27 Government to inquire in regard to the electronic surveillance  
28

1 described, supra, of all state, local, and foreign jurisdictions  
2 conducting electronic surveillance investigating Defendant or  
3 cooperating with same surveilling and investigating  
4 jurisdiction.

5 (C)

6 **MOTION FOR INFORMATION REGARDING GOVERNMENT**  
7 **WITNESSES AND INFORMANTS**

8 Regarding Government witnesses, Defendant hereby moves  
9 this Court to order the following:

10 1. Any and all records and information revealing prior  
11 felony convictions or guilty verdicts or juvenile adjudications  
12 attributed to each witness called by the Government including  
13 but not limited to relevant "rap sheets."

14 2. Any and all records and information revealing prior  
15 misconduct or bad acts attributed to the witness.

16 3. Any and all consideration or promises of  
17 consideration given to or on behalf of the witness or expected  
18 or hoped for by the witness. By "consideration," Defendant  
19 refers to absolutely anything, whether bargained for or not,  
20 which arguably could be of value or use to a witness or to  
21 persons of concern to the witness, including but not limited to  
22 formal or informal, direct or indirect: leniency, favorable  
23 treatment or recommendations or other assistance with respect to  
24 any pending or potential criminal, parole, probation, pardon,  
25 clemency, civil, tax court, court of claims, administrative,  
26 foreign assistance or other dispute with plaintiff or with any  
27 with visas or criminal immunity or other authority Federal,  
28 State, local, or foreign or with any other parties; criminal,

1 civil, or tax immunity grants; relief from forfeiture; payments  
2 of money, rewards or fees, witness fees and special witness  
3 fees, provisions of food, clothing, shelter, transportation,  
4 legal services, or other benefits; placement in a "witness  
5 protection program," informer status of the witness; and  
6 anything else which arguably could reveal an interest, motive,  
7 or bias in the witness in favor of the Government or against the  
8 defense or act as an inducement to testify or to color  
9 testimony.

10 4. Any and all threats, express or implied, direct or  
11 indirect, or other coercion made or directed against the  
12 witness; criminal prosecutions, investigations, or potential  
13 prosecutions pending or which could be brought against the  
14 witness; any probationary, parole, deferred prosecution or  
15 custodial status of the witness; and any civil, tax court, court  
16 of claims, administrative, foreign criminal or fiscal problems  
17 or other pending or potential legal disputes or transactions  
18 with the Government or any Foreign Government or over which the  
19 Government or any Foreign Government has real, apparent, or  
20 perceived influence.

21 5. The existence and identification of each occasion on  
22 which the witness has testified before any court, grand jury, or  
23 other tribunal or body, or otherwise officially narrated  
24 proceeding regarding the Defendant, the investigation, or the  
25 facts of this case.

26 6. The existence and identification of each occasion on  
27 which the witness, who was or is an informer, accomplice, co-  
28

1 conspirator, or expert, has testified before any court, grand  
2 jury, or other tribunal or body.

3           7. Any and all personnel files for the witness; the  
4 existence and identity of all federal, state, local, and foreign  
5 government files for the witness; and the existence and identity  
6 of all official internal affairs, internal investigations, or  
7 public integrity investigations files relating to or connected  
8 with each witness who was or is a law enforcement officer or  
9 witness for the government.

10           8. Any and all other records and/or information which  
11 arguably could be helpful or useful to the defense in impeaching  
12 or otherwise detracting from the probative force of the  
13 Government's evidence or which arguably could lead to such  
14 records or information.

15           9. The same records and information requested in Items  
16 1 through 8, above, with respect to each non-witness declarant  
17 whose statements are offered in evidence.

18           Regarding Informants, Defendant hereby moves this Court  
19 to order the following:

20           1. The names and identities of the Government  
21 informants used in this case.

22           2. The present residence address, business address and  
23 telephone numbers, and all other information regarding the  
24 present location of said informants.

25           3. Information concerning what inquiries and  
26 arrangements have been made by the Government to keep in touch  
27 with and locate said informants.

28

1           4. All recommendations for sentencing that the  
2 Government may request at the sentencing of each informant.

3           5. All agreements to accept a plea to a reduced offense  
4 or to, in effect, limit the amount of incarceration of the  
5 informants.

6           6. A list of all crimes that the Government agreed to  
7 either cease investigating, or not prosecute, or not to refer  
8 for filing against each informant.

9           7. A list of all offenses that the Government has  
10 learned of subsequent to any agreement with each informant, that  
11 the Government will not now investigate or prosecute because of  
12 its prior agreement with the informants.

13           8. A list of any recommendations, suggestions, or any  
14 other conduct favorable to the accused that the Government  
15 supplied to the probation department or parole commission  
16 regarding the ending of probation or a parole date for each  
17 informant in this matter.

18           9. An accounting of all funds paid to each informant in  
19 the instant matter and any other matter for information,  
20 reward, travel, expense, etc., from the beginning of the  
21 investigation in the instant case up to and including the  
22 present time and to the commencement of the trial.

23           10. A list of investigations that have been commenced  
24 or continued based upon information from each informant in the  
25 instant matter.

26           11. A list of all offenses known by the Government to  
27 be committed by each informant including those done while  
28

1 cooperating with the government in the instant matter subsequent  
2 to his original agreement to cooperate with the Government in  
3 this matter, if any.

4 12. A list of any offenses, misconduct, or violation  
5 of rules committed by each informant.

6 13. Any other inducements, rewards, or benefits that  
7 have been directly or indirectly provided to each informant in  
8 this matter for his cooperation in this case, or any other case.

9 (D)

10 **REQUEST FOR LEAVE TO FILE ADDITIONAL MOTIONS**

11 \_\_\_\_\_Defendant, by and through his attorney, hereby requests  
12 this Court to grant leave to file additional motions in this  
13 matter.

14 Currently, counsel for Defendant has filed Motions for  
15 Discovery, for Disclosure of Electronic Surveillance, and for  
16 Information Regarding Government Witnesses and Informants.  
17 Defendant has not filed a motion to suppress intercepted  
18 communications because the Government, while at first admitting  
19 that intercepted communications led to Defendant's being stopped  
20 at the U.S.-Mexican border as he attempted entry into the  
21 Republic of Mexico, has now refused to state or admit whether a  
22 wiretap was involved in this investigation.

23 These Motions are based upon the within Notice of Motion  
24 and Motion, the Memorandum of Points and Authorities attached  
25 hereto, all the files and records in the above-captioned case,  
26 and any and all other matters which may be brought to this  
27 Court's attention prior to or at the time of hearing the within  
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1 Motion.

2 DATED: August 12, 2008

Respectfully submitted,

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S/ Philip A. DeMasa

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PHILIP A. DeMASSA

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Attorney for Defendant

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VICENTE MANUEL AGUIRRE

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10 VICENTE MANUEL AGUIRRE  
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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	CASE NO. 08CR2428 JAH
	)	
Plaintiff,	)	POINTS AND AUTHORITIES IN
	)	SUPPORT OF MOTION FOR
v.	)	DISCOVERY; SEARCH AND
	)	DISCLOSURE OF ELECTRONIC
VICENTE MANUEL AGUIRRE,	)	SURVEILLANCE, ETC.
	)	
Defendant.	)	
	)	DATE: August 25, 2008
	)	TIME: 8:30 a.m.

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5	<u>United States v. Feinberg</u> , 502 F.2d 1180 (7th Cir.), cert. den. 429 U.S. 926 (1974) . . . . .	3
6	<u>United States v. Fowler</u> , 475 F.2d 566 (D.C. Cir. 1972) . .	14
7	<u>United States v. Garrett</u> , 542 F.2d 23 (6th Cir. 1976) . . .	13
8	<u>United States v. Garrett</u> , 305 F.Supp. 267 (S.D. N.Y. 1969) . 2,3	
9	<u>United States v. Gleason</u> , 265 F.Supp. 880 (S.D. N.Y. 1967) .	12
10	<u>United States v. Gerard</u> , 491 F.2d 1300 (9th Cir. 1974) . . .	10
11	<u>United States v. Goldman</u> , 439 F.Supp. 377 (S.D. N.Y. 1977) . .	3
12	<u>United States v. Harris</u> , 543 F.2d 1247 (9th Cir. 1976) . .	2, 6
13	<u>United States v. Harris</u> , 388 F.2d 373 (7th Cir. 1967) . . . .	8
14	<u>United States v. Hitchmon</u> , 609 F.2d 1098 (5th Cir. 1979) . .	13
15	<u>United States v. Houston</u> , 339 F.Supp. 762 (N.D. Ga. 1972) . .	12
16	<u>United States v. Jackson</u> , 508 F.2d 1001 (7th Cir. 1975) . . .	4
17	<u>United States v. James</u> , 495 F.2d 434 (5th Cir.), cert. den. 419 U.S. 899 (1974) . . . . .	2, 6
18	<u>United States v. Johnson</u> , 525 F.2d 999 (2nd Cir.1975) . . .	1
19	<u>United States v. Joseph</u> , 533 F.2d 282 (5th Cir. 1976) . . . .	5
20	<u>United States v. Kelly</u> , 420 F.2d 26 (2nd Cir. 1960) . . . . .	4
21	<u>United States v. Lombosky</u> , 277 F.Supp. 713 (N.D. Ill. 1967) . . .	2
22	<u>United States v. Mancusi</u> , 379 F.2d 897 (2nd Cir. 1967) . . . .	8
23	<u>United States v. Manettes</u> , 551 F.2d 1352 (5th Cir. 1977) . . .	1
24	<u>United States v. Mayer</u> , 556 F.2d 245 (5th Cir. 1977) . . .	9, 13
25	<u>United States v. Miller</u> , 529 F.2d 1125 (9th Cir. 1976) . . .	12
26	<u>United States v. Mocerì</u> , 359 F.Supp 431 (N.D. Ohio 1973) . . .	6
27	<u>United States v. Morell</u> , 524 F.2d 550 (2nd Cir. 1975) . . . .	13
28		

1	<u>United States v. Narcisco</u> , 446 F.Supp. 252 (E.D. Mich. 1977).	12
2	<u>United State v. Padgent</u> , 432 F.2d 701 (2nd Cir. 1970) . . . .	10
3	<u>United States v. Parker</u> , 549 F.2d 1217 (9th Cir.)	
	cert. den. 430 U.S. 971 (1977) . . . . .	2, 6
4	<u>United States v. Phillips</u> . 482 F. 2d 1355 (9th Cir.)	
5	cert. den. 419 U.S. 847 (1973). . . . .	6
6	<u>United States v. Richter</u> , 488 F.2d 170 (9th Cir. 1973). . . .	4
7	<u>United States v. Rose</u> , 526 F.2d 745 (8th Cir.)	
	cert. den., 426 U.S. 905 (1976). . . . .	9
8	<u>United States v. Sperling</u> , 506 F. 2d 1324 (2nd Cir.)	
9	cert. den. 420 U.S. 962 (1974). . . . .	6
10	<u>United States v. Sutton</u> , 542 F.2d 1239 (4th Cir. 1976) . . .	10
11	<u>United States v. Tanner</u> , 279 F.Supp. 457 (N.D. Ill. 1967). .	3
12	<u>Wilson v. United States</u> , 232 U.S. 563 (1914). . . . .	14
13	<u>Wiman v. Powell</u> , 293 F. 2d 605 (5th Cir. 1971) . . . . .	14

#### **RULES OF CRIMINAL PROCEDURE**

15	6 . . . . .	4
16	16(a) . . . . .	passim

#### **RULES OF EVIDENCE**

18	404 . . . . .	7
19	608 . . . . .	9
20	609 . . . . .	9
21	801 . . . . .	11
22	806 . . . . .	11

#### **TREATISES**

24	Weinstein's Evidence, Section 404 . . . . .	7
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7  
8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA, ) CASE NO. 08CR2428 JAH  
11 )  
12 Plaintiff, ) POINTS AND AUTHORITIES IN  
13 ) SUPPORT OF MOTION FOR  
14 v. ) DISCOVERY; SEARCH AND  
15 ) DISCLOSURE OF ELECTRONIC  
VICENTE MANUEL AGUIRRE, ) SURVEILLANCE, ETC.  
16 )  
17 Defendant. )  
18 ) DATE: August 25, 2008  
19 ) TIME: 8:30 a.m.  
20 )

21 (A)

22 REQUESTED ITEMS OF GENERAL DISCOVERY AND BRADY MATERIAL

23 1. Defendant's Statements - Rule 16 (a) (1) (A)

24 A defendant's statements must be disclosed.

25 2. Written or Recorded Statements of Defendant-Rule 16(a) (1) (A)

26 (a) Statements may be inculpatory or neutral as long as they  
27 are relevant to the crime charged. United States v.  
28 Manettes, 551 F.2d 1352, 1356 (5th Cir. 1977).

(b) Statement are producible regardless of whether used by  
the Government in its case-in-chief or possible rebuttal  
or impeachment and whenever made. United States v.  
Caldwell, 543 F. 2d 1333, 1352, n.93 (D.C. Cir. 1974);

1           United States v. Johnson, 525 F.2d 999 (2nd Cir.1975).

2           (c) Any document written out or signed by the defendant  
3           which is relevant to the crime charged is discoverable.

4           Caldwell, supra, 543 F.2d at 1352, n.93.

5           (d) An oral statement recorded by any means is discoverable.  
6           Caldwell, supra.

7           (e) The statement may itself constitute a part of or made  
8           during the commission of the alleged offense. Caldwell,  
9           supra; United States v. James, 495 F.2d 434 (5th Cir.),  
10          cert. den. 419 U.S. 899 (1974) Such recordings would  
11          also be tangible objects discoverable under Rule  
12          16(a)(1)©). United States v. Lombosky, 277 F.Supp. 713,  
13          720 (N.D. Ill. 1967).

14          (f) An oral statement of defendant, recited or summarized in  
15          an investigative report or in notes is discoverable as  
16          a "written or recorded statement" without regard to  
17          whether it is verbatim or when the notes were made.  
18          United States v. Parker, 549 F.2d 1217 (9th Cir.), cert.  
19          den. 430 U.S. 971 (1977); United States v. Harris, 543  
20          F.2d 1247 (9th Cir. 1976). The Jencks Act is  
21          inappropriate in the interpretation of Rule 16 (a)(1)A)  
22          since the Jencks Act is the use of a prior statement of  
23          a witness which is limited to impeachment after he  
24          testifies at trial. Palermo v. United States, 360 U.S.  
25          343 (1959). Moreover, the Jencks Act itself contains an  
26          exception for the statements of the defendant from its  
27          restriction on pre-trial discovery of witness  
28

1 statements. Title 18 U.S.C. Section 3500(a); see, United  
2 States v. Garrett, 305 F.Supp. 267 (S.D. N.Y. 1969).

3 **3. Oral Statements to Persons not Government Agents**

4 Discovery of oral statements that defendant may have made to  
5 persons not Government agents is authorized under Rule 16 or the  
6 inherent power of the Court. There was authority that such  
7 statements were producible. United States v. Ahamd, 53 F.R.D.  
8 186, 190 (N.D.Pa. 1971). The 1975 amendments to Rule 16 were  
9 intended to expand the scope of available discovery, not to  
10 contract it. There is "fundamental fairness" involved in  
11 "granting the accused equal access to his own words, no matter  
12 how the Government came by them." Caldwell, 543 F.2d at 1352.  
13 Therefore, the defendant is entitled to a copy of any statements  
14 that he may have made that are presently in the possession of  
15 the Government. United States v. Feinberg, 502 F.2d 1180, 1182  
16 (7th Cir.), cert. den. 429 U.S. 926 (1974).

17 **4. Documents and Tangible Objects Under Rule 16(a)(1)(A)**

18 Discovery is producible to a defendant in three specified  
19 situations: (a) those which are "material" to the preparation  
20 of his defense; (b) those which are intended for use by the  
21 Government as evidence in its case-in-chief; and (c) those which  
22 were obtained from or belong to the defendant.

23 The requirement the Government disclose the documents and  
24 tangible objects it intends to use in its case-in-chief at trial  
25 is unequivocal. United States v. Goldman, 439 F.Supp. 377, 351  
26 (S.D. N.Y. 1977); United States v. Tanner, 279 F.Supp. 457, 472  
27 (N.D. Ill. 1967). "[I]ntended for use by the Government as  
28



evidence in chief at trial" includes not only documents to be marked and offered by the Government, but also documents to be relied on or referred to in any way by any Government witness during the Government's case-in-chief. United States v. Countryside Farms, 428 F.Supp. 1150 (D. Utah 1977).

**5. Reports of Examinations and Tests - Rule 16(a)(1)(D)**

Defendant is entitled to the results of any scientific analysis of the evidence. United States v. Kelly, 420 F.2d 26 (2nd Cir. 1960).

**6. Names of Witnesses**

Courts have inherent Judicial Power to order the disclosure of Government witnesses in appropriate cases. United States v. Cannone, 528 F.2d 296 (2nd Cir. 1975); United States v. Jackson, 508 F.2d 1001 (7th Cir. 1975); United States v. Richter, 488 F.2d 170, 173, 174 (9th Cir. 1973).

**7. Statements of Witnesses**

Rule 16 sets forth the minimal requirement for discovery in the federal courts and does not limit the inherent power of the Court to order discovery. In appropriate circumstances, statements of Government witnesses to be called at trial have been ordered discoverable even when said statements are covered by the Jencks Act. Narcisco, supra, 446 F.Supp. at 270, 271.

**8. Discovery of Grand Jury Testimony - Rule 6 (e)**

In Dennis v. United States, 384 U.S. 855 (1966), the Court allowed the "particularized need" for disclosure of Grand Jury testimony to be met if: (1) Disclosure of the testimony of only a limited number of witnesses was sought; (2) These were "key"

1 witnesses, without whose testimony the case could not have been  
2 prosecuted; (3) Their trial testimony included oral references  
3 to statements by the defendants, and the Court indicated that  
4 "where the question of guilt or innocence may turn on exactly  
5 what was said, the defense is clearly entitled to all relevant  
6 aid which is reasonably available to ascertain the precise  
7 substance of the statements."; (4) Some of the witnesses were  
8 accomplices of the defendants, and another had demonstrated  
9 hostility to the defense; (5) One of the witnesses acknowledged  
10 inconsistencies in his earlier statements; and (6) The case  
11 involved the charge of conspiracy, in which the Court said,  
12 "[i]t was especially important that the defense, the judge and  
13 jury should have the assurance that the doors that may lead to  
14 the truth have been unlocked," 384 U.S. at 873.

15 Pre-trial discovery of Grand Jury testimony should be more  
16 freely available. Allen v. United States, 390 F.2d 476 (D.C.  
17 Cir. 1968); Gibson v. United States, 403 F.2d 166 (D.C. Cir.  
18 1968).

19 **9. Notes, Tape Recordings, Conversations, etc. Between the**  
20 **Defendant and any Confidential Informant and/or Government**  
21 **Witnesses**

22 The accused is entitled to more than the identity and  
23 whereabouts of an informant, including:

- 24 (1) Any evidence disclosing the informant's arrangement or  
25 agreement with the Government. United States v. Joseph,  
26 533 F.2d 282 (5th Cir. 1976).  
27 (2) Names and address of prospective Government witnesses  
28

1 unless the Government can affirmatively show that  
 2 coercion or harm would come to the witness. United  
 3 States v. Moceri, 359 F.Supp 431 (N.D. Ohio 1973).

4 (3) Any communications with the Government setting forth  
 5 past favors it conveyed on the informant or the  
 6 informant asked of the Government. United States v.  
 7 Sperling, 506 F. 2d 1324 (2nd Cir.) cert. den. 420 U.S.  
 8 962 (1974).

9 (4) Vouchers reflecting payments the informant has received.  
 10 United States v. Phillips. 482 F. 2d 1355 (9th Cir.),  
 11 cert. den. 419 U.S. 847 (1973).

12 (5) Copies of any tape recordings between the accused and  
 13 the informant dealing with the charged offenses.  
 14 James, supra.

15 (6) Notes prepared by the informant or prepared by the  
 16 Government agents and acknowledged by the informant.  
 17 United States v. Carrasco, 537 F.2d 372 (9th Cir. 1976).

#### 18 **10. Notes Prepared by the Government Agents**

19 Notes prepared by Government agents must be preserved until  
 20 the Court has had an opportunity to determine whether they are  
 21 "produced" and that the Government may not destroy said notes  
 22 without prior judicial approval. Parker, supra, 1549 F.2d 1217;  
 23 United States v. Harris, 543 F.2d 1247 (9th Cir. 1976).

#### 24 **11. Disclosure of Intent to Rely on Evidence Of Similar Acts** 25 **or Crimes**

26 The Government must prove the defendant willfully and  
 27 knowingly committed the offenses alleged, often primarily shown  
 28

1 by circumstantial evidence. The Government may introduce  
2 evidence of other acts or wrongs different from those alleged in  
3 the Indictment to prove a defendant's motive, opportunity,  
4 preparation, plan, knowledge, identity, or absence of mistake or  
5 accident under Rule 404 (b) of the Federal Rules of Evidence.  
6 Although Rule 404(b) does not require that advance notice be  
7 given when other crimes or wrongs will be shown at trial, the  
8 Court has the power to require the Government to disclose its  
9 intent to rely on other crimes, wrongs, or acts. Weinstein's  
10 Evidence, Section 404(01), pages 404-413.

11 Failure of the Government to reveal prior to trial the  
12 identity of the person which the Government will rely upon to  
13 show similar acts or wrongs at the trial may result in a  
14 reversal. United States v. Baum, 482 F.2d 1328, 1331, (2nd Cir.  
15 1973). Given the seriousness of the charges, defendant would be  
16 denied his Fifth Amendment right to due process of law and his  
17 Sixth Amendment right to assistance of counsel if the Government  
18 is permitted to conceal the identities of the persons and the  
19 tangible evidence upon which it intends to rely to show similar  
20 acts or wrongs at the time of trial.

21 (B)

22 **Defendant is Entitled to Discovery and**  
23 **Disclosure of Electronic Surveillance**

24 Defendant has a right to discovery of electronic surveillance  
25 by the Government, so that the Court may resolve any suppression  
26 motions arising under the doctrine of Alderman v. United States,  
27 394 U.S. 165, 89 S.Ct. 961 (1969).  
28

1 This motion is particularly relevant in this case as the  
2 government attorney who was assigned to this case pre indictment  
3 admitted to counsel for defendant that defendant was stopped by  
4 law enforcement as he attempted to cross from the United States  
5 into the Republic of Mexico based on a wiretap which intercepted  
6 Defendant's communications. See attached Declaration of Philip  
7 A. DeMassa, ¶ 2.

8 A defendant has standing to object to any non-consensual  
9 surveillance of any conversation to which he is a party  
10 (Alderman, supra) and standing to suppress all evidence gathered  
11 in the course of the surveillance on premises not his own, but  
12 at which he was present at the time of the surveillance. Leeper  
13 v. United States, 446 F.2d 281, 283 (10th Cir. 1971); Gaza-  
14 Fuentes v. United States, 400 F.2d 219 (5th Cir.), cert. den.  
15 394 U.S. 963 (1968). The accused is also entitled to suppress  
16 conversations on premises in which he had an interest even other  
17 than proprietary. McCreary v. Sigler, 406 F.2d 1264 (8th Cir.  
18 1968); United States v. Harris, 388 F.2d 373 (7th Cir. 1967).  
19 Finally, the accused has standing to object to the surveillance  
20 if the surveillance was directed against him. Gaza-Fuentes v.  
21 United States, supra; United States v. Mancusi, 379 F.2d 897  
22 (2nd Cir. 1967).

23 (C)

24 **DEFENDANT IS ENTITLED TO THE DISCLOSURE OF**  
25 **INFORMATION REGARDING THE GOVERNMENT'S WITNESSES**

26 Defendant specifically requests likely sources of impeaching  
27 information within the knowledge or possession of the  
28

1 Government. United States v. Agurs, 427 U.S. 97, 106 (1976).

2 **1. Conviction Records**

3 Disclosure is directly within the ambit of Rule 609 of the  
4 Rules of Evidence. The inclusion of "guilty verdicts" should be  
5 included for purposes of impeachment. United States v. Caraday,  
6 466 F.2d 1191 (9th Cir. 1972) (per curiam); United States v.  
7 Rose, 526 F.2d 745 (8th Cir.), cert. den., 426 U.S. 905 (1976).  
8 Disclosure is plainly in order. Discovery should also extend to  
9 production of any "rap sheets" for witnesses. United States v.  
10 Alvarez-Lopez, 559 F. 2d 1155 (9th Cir. 1977).

11 **2. Witness Misconduct**

12 The Court has discretion to permit a defendant cross-  
13 examination of a witness as to specific instances of misconduct,  
14 or "bad acts," even though such behavior does not amount to  
15 felony conviction, if the evidence impeaches the witness's  
16 truthfulness. Rule 608(b), Federal Rules of Evidence. The  
17 purpose is to attack the witness's character and not to  
18 establish bias, interest, or prejudice. See McCormick,  
19 Evidence, Section 52 at 83 (2nd Ed. 1972).

20 **3. Consideration or Promises**

21 The Government must disclose any and all consideration which  
22 it has held out to a witness or which the witness subjectively  
23 hopes for or anticipates, since such consideration directly  
24 gives rise to the inference of bias or interest. See generally,  
25 United States v. Mayer, 556 F.2d 245, 248 (5th Cir. 1977)  
26 (cross-examination of a prosecution witness who has had prior  
27 dealings with the prosecution or other law enforcement  
28

1 officials "ought to be given the largest possible scope";  
2 conviction reversed); Giglio v. United States, 405 U.S. 150  
3 (1972); Azbill v. Pogue, 534 F.2d 195, 196 (9th Cir. 1976).

#### 4 **4. Bias**

5 The defendant is entitled to be advised of any matter which  
6 might cause a witness to color his testimony in favor of the  
7 Government out of fear or interest in self-preservation. See,  
8 e.g., United States v. Sutton, 542 F.2d 1239 (4th Cir. 1976)  
9 (threat by F.B.I. agent to prosecute witness intended to induce  
10 witness' cooperation).

11 Evidence of a witness' wrongdoing, even though not amounting  
12 to a felony conviction or comparable evidence of moral turpitude  
13 or bad character (such as vulnerability to prosecution,  
14 revocation of parole/probation) may nonetheless be relevant to  
15 show the bias or self-interest of the witness. McCormick,  
16 Evidence, Section 40 at 78-80 (2d Ed. 1972); United States v.  
17 Alvarez-Lopez, supra. See also, United States v. Bonanno, 430  
18 F.2d 1060 (2nd Cir. 1970), cert. den., 400 U.S. 964 (1971)  
19 [Court condemned the Government's failure to disclose an  
20 outstanding indictment against its witness, since the pendency  
21 of the charge would have shown "possible motivation of the  
22 witness to testify favorably for the Government." 439 F.2d at  
23 1062.]; United State v. Padgent, 432 F.2d 701 (2nd Cir. 1970),  
24 [Court reversed defendant's conviction because his counsel had  
25 been denied the right to question a Government witness on cross-  
26 examination with regard to the witness's vulnerability to future  
27 indictment for bail jumping]; United States v. Crumley, 565 F.2d  
28

1 945, 949-50 (5th Cir. 1978); United States v. Gerard, 491 F.2d  
2 1300, 1304 (9th Cir. 1974); Davis v. Alaska, 415 U.S. 308  
3 (1974); Meeks v. United States, 163 F.2d 598, 600 (9th Cir.  
4 1947).

5 **5. Prior Testimony**

6 The existence and identification of each occasion on which  
7 the witness has testified or otherwise narrated relative to the  
8 facts of the instant case should be disclosed so that defendant  
9 may, for example, order transcripts of testimony for use in  
10 cross-examination or investigate sources of extrinsic  
11 impeachment. McCormick, Evidence, Section 34 at 67 (2d Ed. 1972).  
12 See also, rules 801(d)(1) and 806, Federal Rules of Evidence.  
13 If the Government has available information which may lead to  
14 proof of prior inconsistent statements or other evidence helpful  
15 to the accused, fundamental fairness requires that it be turned  
16 over to the defense without further delay. Davis v. Heyd, 479  
17 F.2d 446 (5th Cir. 1973) (Federal habeas corpus relief granted  
18 to state prisoner where undisclosed prior statements of  
19 prosecution witness specifically corroborated defense theory and  
20 contradicted his trial testimony). As the Ninth Circuit stated  
21 in a similar context:

22 We agree with the trial court that [the  
23 witness's] statement was in part  
24 exculpatory material and should have been  
25 turned over to the defense. The fact that  
26 the Government concluded in good faith  
27 that the evidence would not be very  
28 helpful to Miller does not excuse its  
failure to disclose the statement. The  
prosecutor is not merely an advocate for a  
party; he is also an administrator of  
justice. Considering the vast  
investigatory resources and powers at



1 the government's disposal, an elemental  
2 sense of fair play demands disclosure of  
3 evidence that in any way may be  
4 exculpatory. If the Government, upon  
5 request of the accused, has serious doubts  
6 about the usefulness of the evidence to  
7 the defense, the Government should resolve  
8 all doubts in favor of full disclosure.  
9 Such a rule appears particularly  
10 appropriate since disclosure could cause  
11 no harm to the Government while  
12 suppression could very well prejudice the  
13 defendant. United States v. Miller, 529  
14 F.2d 1125, 1128 (9th Cir. 1976) (emphasis  
15 in original) (footnote omitted).

16 This Motion seeks early disclosure of Jencks material only to  
17 the extent required by due process, e.g., United States v. Narcisco,  
18 446 F.Supp. 252, 270-71 (E.D. Mich. 1977); United States v. Houston,  
19 339 F.Supp. 762, 765-66 (N.D. Ga. 1972); United States v. Gleason,  
20 265 F.Supp. 880, 887 (S.D. N.Y. 1967) and primarily seeks  
21 identification of statements not solely "in the possession of the  
22 United States," 18 U.S.C. Section 3500 (a) and (b), so that they may  
23 be obtained from other sources. Thus, the Government should  
24 identify the sources of information which will allow defendant to  
25 make his own pursuit of impeaching information. Cf., Britt v. North  
26 Carolina, 404 U.S. 226 (1971) (indigent defendant entitled to free  
27 transcript, or adequate transcript substitute, of prior trial).

## 28 **6. Prior Informant Testimony**

29 This request takes the previous request one step further. If the  
30 witness is an informer, accomplice, or co-conspirator, the defendant  
31 should also be advised of all occasions, known to the Government,  
32 on which the witness has previously testified, even if the  
33 Government discerns no relation to the case at hand. As to crucial  
34 and inherently suspect witnesses, the defendant must have the

1 greatest possible latitude in investigation as well as in cross-  
2 examination. See, e.g., United States v. Mayer, supra, 556 F.2d at  
3 248-49; United States v. Alvarez-Lopez, supra, 559 F.2d at 1160;  
4 Johnson v. Brewer, 521 F.2d 556 (8th Cir. 1975).

#### 5 **7. Personnel Records**

6 If a government employee serves as a prosecution witness, the  
7 defendant is entitled to have access to his or her government  
8 personnel file in order to ascertain whether there is information  
9 within it which could be of an impeaching nature. United States v.  
10 Deutsch, 475 F.2d 55, 57-58 (5th Cir. 1973); United States v.  
11 Morell, 524 F.2d 550, 552-55 (2nd Cir. 1975)[defense counsel were  
12 entitled to impeaching information in the confidential file of an  
13 informant witness]; United States v. Beeckman, 155 F.2d 580 (2nd  
14 Cir. 1946). Law enforcement witnesses are not immune from this  
15 principle. In United States v. Garrett, 542 F.2d 23 (6th Cir.  
16 1976), the Court of Appeals reversed a drug distribution conviction  
17 in which the defendant had been denied both access to disciplinary  
18 records of the chief witness, a police officer, who had been  
19 suspended from duty for refusal to take a urine test to see whether  
20 he had used hard drugs, and also had been restricted in cross-  
21 examining the officer as to why he had been suspended. See also,  
22 United States v. Hitchmon, 609 F.2d 1098 (5th Cir. 1979) (trial  
23 court prohibits cross-examinations of Government witnesses  
24 concerning an internal D.E.A investigation into the possibility that  
25 two of its agents had given perjured testimony in an effort to  
26 obtain a conviction; conviction reversed;)

27 The personnel and internal investigation files of all law  
28

enforcement witnesses should be disclosed to defense counsel. See, Renshaw v. Ravert, 82 F.R.D. 361, 363-64 (E.D. Pa. 1979).

### **8. Impeaching Information**

Any information which impeaches the witness's competency, his capacity and opportunity to observe, remember, recall, and narrate as well as his character for veracity and his partiality towards one side must be disclosed. The Government cannot suppress, and must disclose, evidence of "basic mental trouble" suffered by a witness. Wiman v. Powell, 293 F. 2d 605, 606, (5th Cir. 1971); Powell v. Wiman, 287 F. 2d 275, 278-79 (5th Cir. 1961). See generally, United States v. Partin, supra, 493 F.2d at 762-64. Likewise, if the Government knows that "truth serum," polygraph examination, use of drugs, etc. have been used in the preparation of witnesses, it must disclose the facts so that the defendant can employ experts to analyze the impact upon the witnesses. United States v. Fowler, 475 F.2d 566, 570-74 (D.C. Cir. 1972); Wilson v. United States, 232 U.S. 563, 568 (1914).

### **CONCLUSION**

For all the reasons advanced above, Defendant respectfully requests this Court to grant defendant's Motions.

DATED: August 12, 2008

Respectfully submitted,

S/ Philip A. DeMassa  
PHILIP A. DeMASSA  
Attorney for Defendant  
VICENTE MANUEL AGUIRRE

1  
2  
3 UNITED STATES DISTRICT COURT  
4 SOUTHERN DISTRICT OF CALIFORNIA

5 UNITED STATES OF AMERICA, ) CASE NO. 08CR2428 JAH  
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I HEREBY DECLARE:

1. I am an attorney licensed to practice law in the State of California and this Court. I represent the Defendant in the above-entitled cause;

2. Before Mr. Vicente Manuel Aguirre was indicted, I had a conversation with Assistant U.S. Attorney James Melendres who told me that the reason Mr. Aguirre was stopped in his vehicle on his way from the United States into the Republic of Mexico was that he (Mr. Aguirre) was involved in a wiretap in the United States.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 13, 2008

PHILIP A. DeMASSA

DECLARATION OF PHILIP A. DeMASSA

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ) CASE NO. 08CR2428 JAH  
)  
)  
Plaintiff, ) CERTIFICATE OF SERVICE  
)  
v. )  
)  
VICENTE MANUEL AGUIRRE, )  
)  
Defendant. )

I HEREBY CERTIFY THAT:

I, PHILIP A. DeMASSA, am a citizen of the United States and am at least eighteen years of age. My business address is 2356 Moore Street, Suite 201, San Diego, CA 92110.

I am not a party to the above-entitled action. I have caused service of Notice of Motion and Motion for Discovery, Disclosure of Electronic Surveillance, etc. and Points and Authorities in Support of Motion for Electronic Surveillance, etc and attached Declaration of Philip A. DeMassa on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System which electronically notifies them:

1. Caroline P. Han, Esq  
Caroline.Han@usdoj.gov

I hereby certify that I have caused to be mailed the foregoing by the United States Postal Service, to the following non-ECF participant(s) in this case:

1. None

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 13, 2008

s/Philip A. DeMassa  
PHILIP A. DeMASSA

CERTIFICATE OF SERVICE